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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 250

CARL BRANDENFELS,
Petitioner,

vs.

J. EDWARD DAY, Postmaster General, et al.,
Respondents.

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR CERTIORARI

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THE PETITIONER WAS DENIED HIS DAY IN THE COURT BELOW

This Court in Letulle vs Scofield, 308 U. S. 415, (1939) granted certiorari because the Court of Appeals had based its decision on a point not presented, argued, or suggested by the litigants. The decision of the Court below was of that very character, with added aggravating circumstances.

The Decision Below

The briefs of the parties in the Court below (lodged with the Clerk of this Court) were the framework within which oral argument was had. No point was argued or suggested beyond those in the briefs.

The parties' briefs demonstrate conclusively that the decision below was on a point not in any way there presented.

Respondent's brief there stated the "Question Presented," in simple terms, saying (p. I):

> "In the opinion of the defendants, appellees here, the sole question presented is: Whether the District Court had jurisdiction of the subject matter of appellant's complaint."

Respondent's brief addressed itself only to that question, contending that there was no case or controversy, and that petitioner had failed to exhaust his administrative remedies (Resp. br. below, pp. 10-24).

Petitioner's briefs in the Court below likewise made no mention of the point on which that Court decided the case.

Respondent's brief went so far as to confess error having been committed against petitioner by the District Court. Conceding that the dismissal of the complaint was erroneous because "with prejudice" respondents asked (Resp. br., pp. 24, et. seq.), that the dismissal "order . . . be modified on appeal . . . so as to reflect a jurisdictional dismissal of the complaint; and, as modified, the order . . . be affirmed." Respondent's brief submitted the full text of a proposed order which would carry out this request (pp. 26, 27).

Despite agreement on this point by the parties, the Court below affirmed the dismissal with prejudice.

The grounds for its decision—an agreement to abide by and to accept the Judicial Officer's determination; (waivering any right to judicial review)—were completely improvised by the Court below. They were false in fact, and specious in law, with the opinion significantly omitting to state facts admitted of record, which, if stated, would have revealed the falsity of those upon which the opinion relied.

The petition for certiorari herein so demonstrates. Respondent's opposition only parrots the opinion without benefit of quotation marks and makes no attempt to uphold it as either truthful, rational, or in accord with the record and accepted principles of law. (Resp. Opp. and Reply.)

Thus the Court below assumed the role of an adversary to petitioner, and in that role went factually and legally far beyond the position taken by petitioner's genuine adversaries.

The Court violated its own which rules, require parties to preface their briefs with a statement of the questions presented (Rule 17(b)(1)); (c)(1)), and which generally confine the issues to be considered to points "presented according to the rules . . . ." (Rule 17(g)) Compare Flournoy vs. Wiener, 321 US 253 (1943) where this Court refused to consider a question which appellant had not included in his statement of points.

The injudicious and unjudicial conduct of the Court below thus deprived petitioner of a hearing on the point actually decided. The principle violated was given classic statement in Morgan vs. United States, 304 U.S. 1 (1937) where, in expounding the fundamental requirements of a full and fair hearing, this Court held and said (p. 18, 19):

> "The right to a hearing embraces . . . a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one. Those who are brought into contest with the Government . . . are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

The District Court had acted upon a motion to dismiss the complaint for want of jurisdiction over the subject matter, which conceded the truth of the complaint. Re-

spondents as defendants in that Court raised no question of waiver of right of review by any agreement such as the Court of Appeals found, for the very good reason that no such agreement was alleged. Such a defense could have been raised only affirmatively, in answer, in accordance with the requirements of Rule 8(c) FRCP, relating to "estoppel . . . release . . . waiver, and any other matter constituting avoidance or affirmative defense."

Had such a defense been raised in the District Court, petitioner could have taken issue on the facts, and (presumably) have been heard on the law; moreover, petitioner had the right granted by Rule 15, FRCP, of amendment to the complaint, "freely given when justice so requires," exercisable by petitioner when necessary or appropriate in the light of contentions made.

The erroneous and irrational basis of the decision below could have been clearly demonstrated through the Court below had petitioner known that any such question was in the case.

The Aggravated Character of the Denial of Petitioner's Day in the Court Below

For over ten years petitioner has been seeking a fair administrative or judicial determination of the charges of fraud made against him.

The Judicial Officer's decision was attacked in the complaint filed in the District Court because made on grounds not presented to him in any way by the parties (JA 21), and because of a false finding by him that petitioner had waived his expert scientific evidence (Pet for Cert, p. 5, fn. 1). Instead of *correcting* these errors the Court below *repeated* them with its own failure to give petitioner a hearing on the points actually decided, and with its own false finding of a waiver by petitioner of his right to a judicial review.

It was the denial of the Court below of a fair hearing to petitioner which means that to date petitioner has had no due process of law as required by the Fifth Amendment to the Constitution. (Consolidated Edison Co. v. NLRB, 305 US 197 (1938)).

The opinion of the Court below pays lip service to petitioner's right to judicial review, while effectively denying that right through the denial to petitioner of a fair hearing, on grounds, "without any fair or substantial support." Such artificial reasons cannot defeat the jurisdiction of this Court. (Wolfe v. North Carolina, 364 US 177 (1960)).

THE MEDICAL IMPORTANCE OF THE ISSUES

More than male vanity is involved in petitioner's treatment for hair loss. There has been a striking increase in baldness of the fair sex. In recent years, "the average estimated increase . . . in the practices of dermatologists who noted the increase was 122% . . . [M]ost of the patients . . . complain bitterly about becoming 'bald' and many become despairing and psychically deeply disturbed." [Sulzberger and Kopf, Diffuse Alopecia in Women, its Unexplained Apparent Increase in Incidence, 81 Archives of Dermatology, 566 (1960)].

As in the case of the opposite extreme of excessive hair, the afflicted woman becomes "to the layman an object of amusement, to the physician a riddle in diagnosis, to herself an object of ridicule, social rejection, and abject misery, which, at times, has resulted in suicide." [Bissell, Hirsutism, 53 Annals of the New York Academy of Sciences 742 (1951)].

Thus, outrageous denial of petitioner's rights to fair consideration is accompanied by indifference to and disregard of public interest in the benefits of his treatment.

which may be lost through lack of financial resources to defend repeated oppressive proceedings.

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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